

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:11-cv-0001-CJA-MEH
(Consolidated with 11-cv-00743-CMA-MEH)

WILDEARTH GUARDIANS,

Plaintiffs,

v.

GINA McCARTHY, in her official capacity as
Administrator, United States Environmental
Protection Agency,

Defendant.

DEFENDANT'S SECOND UNOPPOSED MOTION
TO MODIFY CONSENT DECREE

INTRODUCTION

Defendant Gina McCarthy, in her official capacity as EPA Administrator,¹ moves to modify the last of nine deadlines in the Consent Decree entered by this Court on September 27, 2011 (Dkt. No. 67), in accordance with Federal Rules of Civil Procedure 60(b)(5) and 60(b)(6), and in accordance with Paragraph 12 of the Consent Decree. Specifically, EPA requests that Paragraph 7 of the Consent Decree² be modified to provide a limited deadline extension, from November 21, 2013, to January 10, 2014, by which EPA must sign a notice of final rulemaking that meets the regional haze

¹ Gina McCarthy is automatically substituted for Lisa Jackson as the Defendant in this litigation in accordance with Fed. R. Civ. P. 25(d).

² Paragraph 7 of the Consent Decree was previously modified by stipulation or motion on three prior occasions, as explained *infra* at 3-4.

implementation plan requirements for the state Wyoming under the requirements of 40 C.F.R. § 51.309(g).

Counsel for EPA conferred with Ashley Wilmes, counsel for Plaintiff WildEarth Guardians, and Reed Zars, counsel for National Parks Conservation Association (“NPCA”), regarding this modification of the Consent Decree on several occasions between October 22 and November 6, 2013. These Plaintiffs do not oppose the modification of the consent decree described in this motion.³

BACKGROUND

In their complaints, Plaintiffs WildEarth Guardians and NPCA allege that EPA failed to undertake nondiscretionary duties under the Clean Air Act, 42 U.S.C. § 7410(c) and (k), to either approve or disapprove state implementation plans (SIPs) or to promulgate federal implementation plans (FIPs) by deadlines set forth in the Act. The alleged duties primarily concern compliance with regional haze implementation plan requirements under the Clean Air Act for the states of Colorado, Montana, North Dakota and Wyoming that were due by December 17, 2007, under EPA’s regional haze regulations. See Dkt. No. 21, ¶¶ 48-93.

The Consent Decree established dates during 2011 and 2012 by which EPA shall sign notices of proposed rulemaking and final rulemaking that address SIPs, FIPs, or partial SIPs and partial FIPs to meet regional haze implementation plan requirements in these States. EPA completed its rulemaking obligations with respect to North Dakota, Colorado and Montana. It proposed rulemaking to address regional haze

³ Plaintiff Environmental Defense Fund did not assert a claim regarding Wyoming regional haze requirements and, therefore, the Consent Decree did not require that EPA consult with the Environmental Defense Fund regarding the extensions sought in this motion. See Decree ¶ 12.

implementation plan requirements for Wyoming on May 15, 2012. It provided notice in the Federal Register and solicited public comment on the proposed rule. 77 Fed. Reg. 33,022 (June 4, 2012).

Paragraph 7 of the Consent Decree, as originally entered by the Court, required EPA to sign, by October 15, 2012, a notice of final action to address regional haze implementation plan requirements for Wyoming.

EPA, WildEarth Guardians and NPCA stipulated to extend the deadline in Paragraph 7 of the Consent Decree for final action on rulemaking to meet the regional haze implementation plan for Wyoming. See Dkt No. 69. The stipulated extension bifurcated the final action. These parties agreed to extend the deadline, from October 15, 2012, to November 14, 2012, for final action under the regional haze requirements of 40 C.F.R. § 51.309, other than action required under 40 C.F.R. § 51.309(g). The parties further agreed to extend the deadline in Paragraph 7, from October 15, 2012, to December 14, 2012, for final action under the requirements of 40 C.F.R. § 51.309(g).

EPA took the first of the two Wyoming regional haze final actions on November 14, 2012, under the regional haze requirements of 40 C.F.R. § 51.309, other than action required under 40 C.F.R. § 51.309(g). 77 Fed. Reg. 73,926 (Dec. 12, 2012). EPA moved to extend the deadlines associated with issuance of a final regional haze plan for Wyoming under the requirements of 40 C.F.R. § 51.309(g) because the public comments EPA received on its proposed rule required EPA to conduct additional research and analyses and necessitated the re-proposal of the rule in order to address and allow public comment on the new information. See Dkt No. 70. WildEarth Guardians and NPCA did not oppose EPA's motion, and the Court issued an order

setting a new deadline of March 29, 2013, for signing a notice of a re-proposed rulemaking, and a deadline of September 27, 2013, for signing a notice of final rulemaking to meet the regional haze implementation plan requirements for Wyoming. Dkt No. 71.

The parties subsequently filed a stipulation, in accordance with Paragraph 12 of the Consent Decree, to extend the deadline for signing a proposed rule to May 23, 2013, and the deadline for signing the final rule to November 21, 2013. Dkt. No. 72. EPA signed the proposed rule on May 23, 2013, and notice of the proposed rule was published in the Federal Register to solicit public comment. 78 Fed. Reg. 34,738 (June 10, 2013). By this motion, EPA seeks to extend the November 21, 2013, deadline to January 10, 2014.

ARGUMENT

EPA has made substantial progress in developing a final rule to meet regional haze implementation requirements for Wyoming, but unanticipated events since March 2013 justify the short extension of time sought by this motion. These events include delays associated with the extension of the public comment period, the lapse of agency appropriations in October 2013, a recent court of appeals decision that prompted the submission of late comments, and a recently filed complaint under the Freedom of Information Act. These changed circumstances justify extension of the November 21, 2013, deadline to January 10, 2014.

Four changed circumstances support modification of the Consent Decree. First, EPA did not anticipate the need to provide additional opportunities for public comment on its proposed rule. The proposed rule provided for a 60-day comment period (the

Clean Air Act requires a minimum of 30 days) and one public hearing. 78 Fed. Reg. at 34,738. Within days of publication of the proposed rule, the Governor of Wyoming, the Wyoming Congressional delegation and the Wyoming Department of Environment Quality submitted letters requesting that EPA extend the comment period and schedule additional public hearings. In response, EPA extended the public comment period by 17 days and scheduled two additional public hearings. This adversely impacted EPA's schedule. Because the vast majority of the comments were received on the last day of the comment period, EPA was delayed in evaluating and responding to the comments and developing the final rule.

Second, the lapse in agency appropriations in October further reduced EPA's available time to respond to comments and finalize the rule. Except in very limited circumstances, EPA employees were prohibited from working, even on a voluntary basis, from the end of September 30, 2013 through October 16, 2013. EPA did not conduct any work on the Wyoming regional haze implementation plan during the 16-day lapse in appropriations. Further, EPA employed a contractor to support EPA in responding to the public comments on the proposed rule. As a result of the lapse in appropriations, EPA ordered its contractor to stop work on October 1, 2013, and the contractor did not resume work until October 17, 2013.

Third, late comments prompted by a recent court of appeals decision have contributed additional work to the rulemaking process. On September 23, 2013, the Eighth Circuit Court of Appeals issued its decision in petitions for review of EPA's final action on North Dakota's regional haze implementation rule. *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013). The court of appeals denied the petitions for review on almost

all issues, but vacated an EPA federal implementation plan for one power plant based on the court's rejection of EPA's interpretation of the BART factor that requires consideration of "any existing pollution control technology in use at the source." *Id.* at 762-64. This holding prompted several late comments with related detailed attachments addressing existing pollution control technologies at sources in Wyoming.

Fourth, a recently filed complaint under the Freedom of Information Act ("FOIA") related to the Wyoming regional haze plan has diverted EPA employees that could have been working on the final rule. On August 15, 2013, PacifiCorp, one of the owners of power plants in Wyoming, filed a complaint that alleges EPA did not comply with PacifiCorp's FOIA request that sought records related to the Wyoming regional haze consent decree. See *PacifiCorp v. EPA*, No. 13-cv-02187- WYD (D. Colo.).

Therefore, the combination of these four unanticipated events justify the unopposed modification of the November 21, 2013, deadline to January 10, 2014, by which EPA must sign a notice of final rulemaking that meets the regional haze implementation plan requirements for the state Wyoming under the requirements of 40 C.F.R. § 51.309(g).

CONCLUSION

For the reasons set forth above, the Court should order that Paragraph 7 of the Consent Decree be modified as follows:

EPA shall by January 10, 2014, sign a notice of final rulemaking promulgating a FIP for the State of Wyoming, to meet the regional haze implementation plan requirements that were due by December 17, 2007, under the requirements of 40 C.F.R. § 51.309(g), unless, by January 10, 2014, EPA has signed a notice of

final rulemaking unconditionally approving a SIP, or promulgating a partial FIP and partial unconditional approval of a SIP, for the State of Wyoming that meets the regional haze implementation plan requirements that were due by December 17, 2007, under the requirements of 40 C.F.R. § 51.309(g).

Dated: November 14 , 2013

ROBERT G. DREHER
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s/ Alan D. Greenberg

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November 2013, I electronically filed the foregoing Defendant's Second Unopposed Motion to Modify Consent Decree with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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